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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. 966

EVERETT S. HAMMAN and
CLELLA P. HAMMAN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

HERBERT L. FAULKNER,
417 Montgomery Street,
San Francisco, California 94104,
Attorney for Petitioners.

MORRIS M. GRUPP,
Mills Tower Building,
San Francisco, California 94104,
Of Counsel for Petitioners.

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No.

EVERETT S. HAMMAN and
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Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Your petitioners, Everett S. Hamman and Clella P. Hamman, respectfully pray for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in order to review its judgment affirming a conviction of both petitioners in the United States District Court for the Northern District of

California, Southern Division, on one count of a two-count indictment charging violations of Section 7201, Title 26, United States Code for each of the years 1956 and 1957. The petitioners were found not guilty as to the 1956 count and guilty as to the 1957 count. (Appendix A.)

OPINION BELOW

The opinion of the Court below dated January 5, 1965 and the minute order filed on February 16, 1965 denying a petition for rehearing are not yet reported and are here annexed as Appendix A and B respectively.

Copies of the opinion and the Judgment are attached hereto and marked Appendix C.

JURISDICTION

The jurisdiction of this Court is conferred by 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners by merely entering a plea of not guilty to a criminal charge opened the gates so as to permit the introduction of alleged prior offenses to prove a "pattern" and "intent"?

2. Whether in an income tax evasion criminal case it was proper to solely employ the net worth method (held to be an approximation) where the alleged understatement of income was so small that "an approximation" could itself spell the difference between guilt and innocence?

3. Whether the net worth method alone, may be employed in an income tax evasion case where other methods of checking are readily available, such as bank accounts, books and records of a defendant:

A. Where there was only a spread of one year (the year of the alleged evasion) to support a net worth increase?

B. Where the only source of probable income established was the very source which produced all of the income declared by petitioners in their income tax returns without establishing that that source was capable of producing the income declared plus that allegedly understated?

C. Where the proof failed to establish that the alleged increased net worth was created by income for the year in issue?

D. Where the computation relied upon by the Government was prepared by a Government expert, whose source of information, *in toto*, was hearsay and who admittedly examined no books and no records even though they were made available to him and were admitted into evidence, and who admittedly limited his preparation of a computation as designated by the United States Attorney?

REASON FOR GRANTING THE WRIT AND ARGUMENTS AMPLIFYING THE SAME

RE QUESTION 1

Evidently conforming to the reasoning of the United States Attorney that prior alleged offenses of petitioner were admissible "to show a consistent pattern of tax evasion as *being a matter that bears upon their* state of mind in the years that really count—1956 and '7" (R.T. Vol. I, p. 12, li. 13-16) and to show "the intent and state of mind of the defendant in the year 1956-'57" (R.T. Vol. I, p. 82, li. 20-23) the court below held that evidence regarding such prior alleged offenses was properly admissible.

The reasoning of the court was that wilfulness as an essential element of the offense having been put in issue by a plea of not guilty, that such prior offenses were properly part of the Government's burden of proof since they would establish, or tend to establish, a wilful state of mind.

At the outset two concepts should be noted. If the court's reasoning in this regard was correct then evidence of prior offenses would always be admissible in any criminal prosecution for a crime of which the mens rea was wilfulness. The copious volumes and cases regarding the admissibility of prior offenses and the absolute prohibition of such admissibility to prove a mere criminal predisposition or propensity fly in the face of such reasoning.

The second basic concept is that the most singularly important question to be answered to determine the admissibility of prior offenses is whether a defendant

has denied the *existence* of the crime itself or has admitted the existence of the crime and denied another essential element linking him to *that perviously established offense.*

People v. Lapin, 130 Cal. App. 2d 251, 291 Pac. 2d 575 notes this distinction quite clearly. There a defendant disclaimed possession of a narcotic and evidence of similar offenses was admitted. Reversing the conviction the court noted that had defendant admitted possession of the substance but disclaimed guilty knowledge, then and only then would evidence of prior offenses have been properly admissible. The court notes that it was the offense itself as distinguished from guilty knowledge that was in issue.

> "The sole issue involved was whether the appellant was in possession of the marijuana in question, so all that evidence of prior offenses could prove was that the defendant was more likely than not in possession of the marijuana here involved. This does not fall within the area of exceptions of the general rule heretofore enunciated, permitting evidence of the prior offense."

It is submitted that the confusion of the United States Attorney, as well as the lower courts in this regard, was due perhaps to a failure to recognize that the procedure of a criminal prosecution must at all times be *responsive* to the issues. *People v. Carmen,* 36 Cal. 2d 768, 228 P. 2d 281.

A plea of not guilty, it is submitted, contrary to the court's opinion below, does not open the door to

admission of previous offenses into evidence. Were this the case, the copious law regarding its inadmissibility would be applicable only to cases where a defendant has pleaded guilty. The absurdity of such a contention is obvious.

The law is that such evidence is admissible by way of rebuttal *when it is responsive to the issues which have been raised by the defense* and is not admissible on the prosecution's case in chief. If after a plea of not guilty the defense contends they are not guilty by reason of lack of intent, guilty knowledge, or identity, then such evidence may be admitted to rebut the same.

In the case at bar there was no defense contention of a lack of intent. Rather it was a denial of the commission of the acts constituting the offense. In such instances evidence of collateral offenses is totally inadmissible since its only purpose could be to establish criminal inclination or predisposition.

See:

Johnson v. United States, 63 S.Ct. 542, 318 U.S. 189;

Wright v. United States (9 Cir.), 192 F.2d 595, 13 Alaska 513;

Williams v. United States (8 Cir.), 272 F.2d 40;

Anthony v. United States (9 Cir.), 256 F.2d 50;

Teasley v. United States (9 Cir.), 292 F.2d 460;

People v. Gibson, 107 Cal. App. 76, 289 P. 937;

People v. Musumeci, 133 Cal. App. 2d 354, 284 P. 2d 168;
People v. Hadley, 84 Cal. App. 2d 637, 141 P. 2d 517;
People v. Anthony, 185 Cal. 152, 196 P. 47;
People v. Lima, 25 Cal. 2d 573, 154 P. 2d 698.

In summation it is submitted that the lower court erred in its finding that a plea of not guilty to an offense puts into issue matters not responsive to the actual issues of the trial and lowers the bars to admission of evidence of previous offenses. The case of *People v. Gibson*, 107 Cal. App. 76, 289 Pac. 937 clearly demonstrates the danger of such a rule.

> "We are aware of the many decisions in cases involving such offenses as embezzlement, forgery, and obtaining money or property by false pretenses, in which testimony of 'other offenses' has been admitted to prove the specific intent to defraud, but an examination of those cases discloses in each some connection between the offense charged and the 'other offense' other and more than the deduction (not recognized in law) that because the defendant committed *that offense*, he must have committed *this offense*.
>
> If such a conclusion were allowed by law, then everyone who has committed a larceny, within such period of time as the trial judge might hold to be within a reasonable time prior to the offense charged, could be convicted of burglary upon entering any store, although such entry be in fact solely for the purpose of purchasing merchandise. We think the exception to the general rule of inadmissibility is not to be extended that far."

> "Our law wholly rejects this character of testimony, not because it does not tend to prove the truth of the charge, but because of the just regard for the rights of the defendant, who, if confronted by such witnesses, instead of being compelled to stand trial on one charge against him, would be confronted by half a dozen or more charges."
> *People v. Anthony,* 185 Cal. 152, 196 P. 47.

Thus the law recognizes an accused's right to be tried solely for the crime charged. Improper admissibility of similar offenses, prejudices a defendant so as to deny him due process.

As stated by Justice Cardozo in *People v. Fachowitz,* 172 N.E. 467, 254 N.Y. 192:

> "There must be no blurring of the issues by evidence illegally admitted and carrying with it in its admission an appeal to prejudice and passions."

RE QUESTION 2

The total tax which petitioners were accused of evading for the year in issue was "$1,147.31." This represented an alleged unreported gross understatement of income of $5,578.66." This understatement was determined by approximating petitioners' total assets at the end of 1957 at "$167,089.62" against approximate starting assets of "$160,240.87." (All figures are from Appendix A.)

We use the term "approximation" because this Court in *Holland v. United States,* 348 U.S. 121 at 129 held:

> "Appellate courts should review the cases bearing constantly in mind the difficulties that arise when substantial evidence as to guilt is the chief weapon of a method that is itself only an approximation."

In all cases where use of the net worth method has been approved the amount of the alleged understatement was of such magnitude that a variance of a few thousand dollars created by "approximation" was totally immaterial.

Here the alleged understatement is so small that a few thousand dollars variance by "approximation" could spell the difference between innocence and a wrongful conviction.

It seems logical to conclude, in following the admonitions of this Court set out in *Holland v. United States*, supra, that use of the net worth method in instances where the "approximation" could be fatal should not be approved.

Certainly in figures of $167,000.00 an approximation within $5,000.00 is allowable, but such is not proof beyond a reasonable doubt.

RE QUESTIONS 3A THROUGH 3D

In *Holland v. United States*, 348 U.S. 127 this Court stated:

At page 132:

> ". . . an essential condition in cases of this type (net worth) is the establishment, with reasonable

certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayers assets . . ."

At page 137:

"Also requisite to the use of the net worth method is evidence supporting the inference that the defendants' net worth increases are attributable to currently taxable income. . . ."

At page 129:

". . . a steadily increasing net worth may justify an inference of additional earnings, unless that increase can be reasonably allocated to the appropriate tax year, the taxpayer may be convicted on counts of which he is innocent. . . ."

At pages 137-138:

"Increases in net worth standing alone cannot be assumed to be attributable to currently taxable income."

If the evidence re the alleged other offenses for 1954 and 1955 was not properly admitted, and since petitioners were acquitted of the 1956 charge, we actually have no reasonably accurate beginning net worth for 1957.

Thus we have here actually just a single year spread of petitioners' net worth, viz. January 1957 through December 1957.

It must be noted from the computation in Appendix A that of an alleged increased net worth in the single year of 1957, of "$9,149.27," "$6,729.39" thereof was

due to increased motel building and furnishings value. (These were listed as $108,552.98 at the beginning of 1957 and $115,282.37 at the end of 1957.) This increase was attributed to 1957 remodeling of the motel and represents 73% of the alleged 1957 net worth increase.

This remodeling was going on from 1954 through 1957 and no evidence was presented to trace this increased net worth to 1957 alone.

This Court noted in *Holland v. United States*, supra, at page 129:

> "Trial courts should approach these cases in the full realization that the taxpayer may be ensnared in a system which though difficult for the prosecution to utilize is equally hard for the defendant to refute."

In the instant case this warning has great significance.

Here we had a computation prepared by an expert who was a veteran of 58 trials as an expert for the Government. (R.T. Vol. IV, p. 373.)

Admittedly this expert had available to him in court, as exhibits, all the petitioners' books and bank checks and bank statements. (R.T. Vol. IV, p. 506.)

This expert's testimony was purposefully limited to hearsay. He limited his work product to that requested by the directives of the United States Attorney. (R.T. Vol. IV, p. 387-389, Vol. V, p. 512-513.)

By his own choice he refused to allow in his calculations for a claimed cash hoard because a Government witness denied he paid such a sum of money to petitioners. (R.T. Vol. IV, p. 387.)

The expert elected to believe the Internal Revenue Agents against the petitioners and thus decided the facts of the case and omitted calculations based on petitioners' theory of the case.

Not one figure in the computation (Appendix A) refers to any cash hoard—because it was prepared *not* on the evidence as a whole—but under the United States Attorney's direction ". . . based on and only on the record as it stands in the case at the time that I make my charts." (R.T. Vol. V, p. 513, li. 13-14.)

Under such evidence a jury is called upon to decide not the "facts" but an expert's determination of those facts based solely on hearsay and on that part of the "facts" most favorable to the Government's position.

A jury is thus faced with an "official" instruction from a Government official who places his factual determination before them and effectively says "I don't believe the defendants and hence I do not consider their evidence or their figures."

At best the acceptance of the net worth method was a departure from the ordinary course of proof. To permit its use to the extent and the method it was used in the instant case represents such a miscarriage of justice as to be a denial of due process.

As above noted, 1957 was a year of heavy remodeling (73% of the alleged net worth increase for 1957

was claimed to result from remodeling). In addition the uncontradicted evidence established that in 1957 there was loss of business due to a nosiy nuisance which was ordered enjoined after a Superior Court judge made a personal inspection of the nuisance.

Yet the Government claimed that the motel's gross income for 1957 increased some $9,149.27 over that of 1956. This represents an increase of approximately 29%.

No evidence was offered to establish that this motel could in 1957 have produced such an increase in the face of the remodeling and the nuisance and there was no evidence that other motels in the area had any general increase in their motel business.

CONCLUSION

It respectfully submitted that this case represents an injustice done to petitioners. Every forewarning given by this Court in *Holland v. United States*, supra, came to the fore.

The Government is placing more and more reliance on the "approximations" of net worth. Its expert was a seasoned man who is not vulnerable to cross-examination because he does not deal in facts or precise figures. He accepts what he is told to accept for the purposes of his calculations. He ignores that which the United States Attorney feels is detrimental to the Government's position.

The gross injustice which here resulted from "an approximation" is apparent.

In dealing with a net worth of some $167,000.00 (based on no records) it could well be approximated at $160,000.00 and result in a not guilty verdict.

Wherefore, petitioners pray that their Writ of Certiorari be granted.

Dated, San Francisco, California,
March 5, 1965.

Respectfully submitted,
HERBERT L. FAULKNER,
Attorney for Petitioners.

MORRIS M. GRUPP,
Of Counsel for Petitioners.

(Appendices A, B and C Follow)

Appendix A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EVERETT S. HAMMAN and CLELLA P. HAMMAN, *Appellants,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 19,280

[January 5, 1965]

On Appeal from the United States District Court for the Northern District of California, Southern Division.

Before: MADDEN, Judge of the United States Court of Claims, and JERTBERG and DUNIWAY, Circuit Judges.

JERTBERG, Circuit Judge:

Following trial to a jury, the appellants, Everett S. Hamman and Clella P. Hamman, husband and wife, were convicted on the second count of a two count indictment. The first count of the indictment charged that appellants did wilfully and knowingly attempt to evade and defeat "a large part of the income tax due and owing by them • • • for the calendar year 1956 by filing and causing to be filed • • •, a false and fraudulent joint income tax return, wherein it was stated that their taxable income for the calendar year 1956 was $1,227.04, and that the amount of tax due and owing thereon was $245.41, whereas, • • •, their taxable income for the calendar year 1956 was $19,894.25, upon which taxable income there was due and owing to the United States of America an income tax of $5,244.05."

The allegations contained in Count Two of the indictment are the same as those contained in Count One, except that the year for which the violation is charged is 1957, and the income tax return filed for that year stated that the appellant's taxable in-

come for that year was zero and that the amount of tax due and owing thereon was zero, whereas their taxable income for the year was $5,578.66, upon which taxable income there was due and owing an income tax of $1,147.31.

The statute involved, 26 U.S.C. § 7201, in pertinent part provides:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, on conviction thereof shall be fined not more than $10,000, or imprisoned not more than five years, or both, * * *."

The jury returned not guilty verdicts as to appellants under Count One.

The record discloses that from about the middle of 1952 through 1958, the appellants owned and operated a motel located at Fort Bragg, California. When they purchased the motel it had only fourteen rental units. Three additional rental units were added sometime in the year 1954 and four additional rental units were added in 1956. Other improvements were made to the motel in each of the four years, and new furnishings and equipment for the motel were added each year during the said period. The motel was purchased by the appellants on the representation made by the former owners that the gross income derived from the motel operations in 1951 was $17,500.00. The annual gross income from the motel operations for the years 1954 through 1957, as reflected in the income tax returns filed by appellants is:

1954	—	$ 25,493.74
1955	—	$ 27,311.12
1956	—	$ 31,722.57
1957	—	$ 29,754.74

The United States relied on the net worth method of proof. To prove the offenses charged in the indictment, the Government introduced evidence to prove annual net worth increases for each of the two indictment years, 1956 and 1957. In order to show a pattern of evasion over a four year period, the United States also introduced evidence tending to prove net worth increases in 1954 and 1955.

The core of the Government's case against the appellants in summary form is as follows:

COMPUTATION OF NET WORTH

ASSETS	12/31/53	12/31/54	12/31/55	12/31/56	12/31/57
Cash on Hand	$ 2,000.00	$ 2,000.00	$ 2,000.00	$ 2,000.00	$ 2,000.00
Bank Accounts:					
(Commercial—Schedule #1)	3,318.53	7,266.53	13,000.19	11,194.81	9,629.84
(Savings Accounts—Schedule #1)	2,370.17	7,842.16	8,509.16	6,632.92	7,498.88
Motel Land	12,615.71	12,615.71	12,615.71	12,615.71	12,615.71
Motel Buildings and Furnishings (Schedule #2)	62,952.49	80,488.29	85,629.21	108,552.98	115,282.37
Noyo River Property				13,809.00	14,059.00
Investors Stock Fund				2,060.45	2,128.82
Ford Ranchwagon	2,700.00	2,700.00	2,700.00	2,700.00	2,700.00
Motor Boat				675.00	675.00
Jeep					500.00
TOTAL ASSETS	$ 85,956.90	$112,912.69	$124,454.27	$160,240.87	$167,089.62
LIABILITIES AND RESERVES					
Deed of Trust—Motel Property	$ 51,074.10	$ 48,301.58	$ 45,620.23	$ 43,054.31	$ 40,131.91
Deed of Trust—Noyo Property				7,734.84	
Reserve for Depreciation	5,901.75	12,016.25	19,141.48	28,105.20	36,461.92
TOTAL LIABILITIES AND RESERVE	$ 56,975.85	$ 60,317.83	$ 64,761.71	$ 78,894.35	$ 76,593.83
NET WORTH	$ 28,981.05	$ 52,594.86	$ 59,692.56	$ 81,346.52	$ 90,495.79

COMPUTATION OF INCOME

	1953	1954	1955	1956	1957
Net Worth—End of Year	$ 28,981.05	$ 52,594.86	$ 59,692.56	$ 81,346.52	$ 90,495.79
Net Worth—Beginning of Year		28,981.05	52,594.86	59,692.56	81,346.52
Increase in Net Worth		$ 23,613.81	$ 7,097.70	$ 21,653.96	$ 9,149.27
Income Tax Liability as Computed		$ 5,504.22	$ 924.52	$ 4,578.82	$ 1,121.93
Income Tax Liability per Return		355.06	— 0 —	245.41	— 0 —
Difference		$ 5,149.16	$ 924.52	$ 4,333.41	$ 1,121.93

The foregoing summary is based upon the oral and documentary evidence adduced by the Government at the trial, and consists of direct evidence from third parties of the assets and liabilities of the appellants during the years in question, together with the filed income tax returns of the appellants and oral admissions made by the appellant, Everett S. Hamman. We are convinced by our review of the record that the summary properly reflects all of the assets and liabilities of the appellants, and establishes with reasonable certainty the opening net worth of appellants for the year 1957, and the increase in net worth for that year. The oral admissions of the appellant, Everett S. Hamman, were thoroughly investigated and were corroborated. When first interviewed concerning his tax returns, said appellant stated that a relative had repaid a $12,000 loan during 1956 and '57, and such sum was deposited in a bank account. When the Government agents were unable to locate such deposits, he stated that the money had been used in the purchase of river property. The relative testified on behalf of the Government that he had never made such payment. At a later interview said appellant stated that when the appellants sold their Oakland house in 1952, eight or nine thousand dollars left from the proceeds of such sale was placed in the bank and were used to make motel improvements. Neither sum was included in the computations appearing in the above summary, or in computations introduced into evidence by the appellants. Further investigation revealed that the proceeds received by the appellants from the sale were only $958.39. Further investigation revealed that appellants had received, during the years in question, no gifts or inheritance.

At the trial evidence was introduced on behalf of the appellants concerning a cash hoard which, if believed by the jury, would have upset the computations contained in the above summary. Appellant, Everett S. Hamman, testified that when he came back from overseas service as a Seabee following the second World War, he brought with him from eighteen to nineteen thousand dollars cash, mostly derived from gambling, which he concealed in one manner and another until he purchased the motel in 1952 at which time he put the money into a metal box which was hidden on the premises. He did so because of a long-standing fear of banks and a desire to have some measure of undisclosed financial security. Appellant, Clella P. Hamman, testified that the funds were gradually transferred from the hiding

place into their bank accounts and used over the years in the motel operations. It developed that appellant, Everett S. Hamman, had done extensive banking in the past, and that during the period when he claimed to have had the $18,000 in cash, he borrowed $3700.00 at 6% interest, and that in 1948 he reported to the Veterans Administration that he was financially unable to pay hospital expenses.

While appellants' specification of errors embraces eight stated errors, it appears in the opening brief as follows:

> "Appellants are restricting their presentation to two major issues which they feel encompass generally all of the specifications of errors listed hereinabove in IV. These issues are:
>
> "(1) That the admission of evidence relating to 'other offenses' of alleged understatement of income for the years 1954 and 1955 was erroneous and prejudicial:
>
> "Basically, it is appellants' position that where it is the act of understatement which is in issue, and neither the intent nor the identification of the appellants is in issue, then
>
> "(a) it is error to admit evidence of the commission of other or similar offenses to prove an intent which is not in issue, and
>
> "(b) it is error to admit such evidence for the purpose of establishing a pattern where identification or modus operandi by similar acts is not an issue in the case.
>
> "(2) That proof of an understatement of income by the net worth method requires the establishment with reasonable certainty by the prosecution of the net worth of the taxpayer at the beginning of the year of the alleged understatement.
>
> "It is appellants' position that where a series of computations are presented which set forth a series of alleged annual net worth increases for the consecutive years 1954 through 1957, both inclusive, the ending net worth of each year obviously represents the beginning net worth of the next year. By way of example the ending net worth figure for 1956 would be the beginning net worth figure for 1957.
>
> "The verdict of the jury finding appellants 'not guilty' of understating their income for the calendar year of 1956 did reject either one or all of the following,

"(1) the government's beginning net worth figure for the year of 1956; or

"(2) the ending net worth figure for the year 1956; or

"(3) the alleged increase in net worth for the calendar year of 1956.

Regardless of which of these alternative determinations were made by the jury, it follows that the chain of net worth beginning and ending figures from 1954 forward was erroneous and totally inaccurate, and that as a result the government failed to establish the beginning net worth for 1957 with reasonable certainty."

We shall first consider (1) above. During the Government's case in chief, the District Court, over appellants' objection, permitted the Government to introduce into evidence exhibits as well as testimony tending to prove understatement of income tax by appellants for the years 1954 and '55. This evidence was admitted by the District Court solely for the purpose of showing a pattern of evasion on the part of the appellants bearing upon the intent of the appellants to violate the statute for the years set forth in the indictment, and the jury was properly instructed as to the limited purpose for which such evidence was received. Appellants concede that evidence of similar offenses is admissible to establish intent or knowledge where the defendant denies such intent or knowledge, but contend that since lack of intent, lack of knowledge, or willfulness was never raised as a defense, such evidence was not admissible as a part of the Government's case in chief. The statute involved, quoted supra, makes willfulness an essential element of the offense. *Holland v. United States,* 348 U.S. 121 (1954). Willfulness was put in issue by appellants' pleas of not guilty, and the burden of proof of that element was upon the Government. *Holland v. United States, supra.* It was an issue which the Government could not ignore in its case in chief without running the risk of facing a motion to acquit at the close of the Government's case because of failure of proof on an essential and indispensable element of the offense. See Rule 29, Federal Rules of Criminal Procedure.

Appellants further contend that such evidence was improperly admitted since a proper foundation was not laid showing that

appellants willfully evaded taxes for such years. Understatement of income tax in prior years, without further evidence of willfulness, is admissible to show intent. See *United States v. Frank*, 245 F.2d 284 (3rd Cir. 1957), C.D. 355 U.S. 819 (1957); *Holland v. United States, supra.* This Circuit has held such evidence admissible in a tax evasion case to establish fraudulent intent as to the offense charged. *Mitchell v. United States,* 213 F.2d 951 (9th Cir. 1954).

Under (2) above, appellants contend that their conviction under Count Two must be reversed because of insufficiency of the evidence to sustain the conviction. Their argument is premised on the fact that "not guilty" verdicts were returned as to the offense charged in Count One relating to the year 1956. They argue that the "not guilty" verdicts import a repudiation by the jury of the Government's net worth computations for 1956 and the preceding years, and that since the opening net worth figure for the year 1957 was the same as the closing net worth figure for 1956, the opening net worth figure for 1957 has no evidentiary support. We believe such reasoning to be specious since there is no way of determining the reasons which prompted the jury to return verdicts of acquittal for the year 1956. We refuse to speculate on the subject. See *Dunn v. United States,* 284 U.S. 390 (1932). Our concern is whether the evidence is sufficient as a matter of law to sustain the conviction, and we believe it to be.

Finally, appellants contend that the proof is insufficient to establish that the increased net worth for the year 1957 resulted from taxable income received in that year. The motel operations of the appellants as a likely source of such increased net worth was established with reasonable certainty, and in light of the evidence presented by both parties the jury could reasonably find, beyond a reasonable doubt, that the increased net worth resulted from unreported rentals received in 1957 from the motel operations.

The judgment of conviction is affirmed.

Appendix B

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of
Tuesday, February 16, 1965

Before: MADDEN, Judge of the United States Court of Claims, and JERTBERG and DUNIWAY, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellants filed February 2, 1965, and within time allowed therefore by rule of court, for a rehearing of above cause be, and hereby is denied.

Appendix C

United States Court of Appeals
for the Ninth Circuit

No. 19,280

Everett S. Hamman and Clella P. Hamman,
Appellants,
vs.
United States of America,
Appellee.

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered January 5, 1965.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 966

EVERETT S. HAMMAN, ET UX., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. i-vii) is reported at 340 F. 2d 145.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1965, and a petition for rehearing was denied on February 16, 1965 (Pet. App. viii, ix). The petition for a writ of certiorari was filed on March 8, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the jury's verdict.

2. Whether, in a trial for the willful attempted evasion of 1956 and 1957 income taxes, the trial court erred in admitting evidence of petitioners' understatement of income on their tax returns for 1954 and 1955 as bearing upon petitioners' intent.

STATEMENT

Petitioners were indicted in the United States District Court for the Northern District of California for willful attempted evasion of their income tax for the years 1956 and 1957 (1 R. 1-3).[1] After a jury trial petitioners were acquitted on the count relating to 1956 and convicted on the count relating to 1957. Everett Hamman was fined $10,000; he was sentenced to six months' imprisonment and four and one-half years' probation. Clella Hamman was sentenced to five years' probation (1 R. 19-20). The evidence may be summarized as follows:

In 1952 petitioners purchased a 14-unit motel at Fort Bragg, California (R. 159-160). Both petitioners worked at the motel (R. 655-656, 886-887), which, beginning in 1953, expanded its operations in each

[1] The designation "1 R." refers to Vol. 1 of the record filed in this Court, consisting of the indictment, docket entries, motions and court orders, the verdict and judgment and the proceedings in the court of appeals. The designation "R." refers to the remaining seven volumes of the record, which comprise the transcript of the trial.

year through the acquisition of new rental units, carports, furnishings, and other equipment (R. 399-405). Both petitioners participated in keeping the books of the business (R. 219, 319, 339), which were conceded by their expert witness at the trial to be inaccurate (R. 966).

The government, proceeding by the net worth method, introduced evidence that from the beginning of 1954 to the end of 1957 petitioners' net worth increased from $28,981.05 to $90,495.79, and that during that four-year period they reported on their income tax returns a total of $3,002.34 of taxable income and $600.47 of tax liability (Pet. App. iii; Govt. Ex. 35, p. 2; R. 416-417). The reported and corrected taxable income for each year was as follows (R. 416-417; Govt. Ex. 35):

Year	Reported	Corrected	Unreported
1954	$1,775.30	$20,590.04	$18,814.74
1955	-0-	4,566.01	4,566.01
1956	1,227.04	17,937.70	16,710.66
1957	-0-	5,463.32	5,463.32
Totals	$3,002.34	$48,557.07	$45,554.73

Petitioners had never received gifts or inheritances which would have accounted for the increase in their net worth (R. 319, 338), and the net worth figures were adjusted to reflect the only nontaxable income petitioners received (R. 338, 411-413; Govt. Ex. 35, p. 2).

Other evidence established that petitioners did not have undeposited cash on hand in excess of the $2,000 credited to them in the government's summary (R.

337); that Everett Hamman had borrowed money from a bank at 6 percent interest at a time when, according to his testimony at the trial, he had $18,000 in cash on hand (R. 727, 744-745, 813-816); and that in 1948 he had represented to the Veterans Administration that he was financially unable to pay hospital expenses (R. 818-820). It was also shown that during the Treasury agents' investigation petitioners had made false statements as to the source of their net worth increases. Everett Hamman had first stated that he had received $12,000 in cash from his brother-in-law as repayment for a loan during 1956 and 1957 and that the money had been deposited in petitioners' bank accounts. Hamman subsequently said that the $12,000 had not been deposited but had been invested directly in real estate (R. 221-222, 319). At the trial, the brother-in-law testified that he had never made any such payment (R. 331-333). Hamman also asserted at one stage of the investigation that he had received between $8,000 and $9,000 from the sale of a house in 1952; in fact, he had received less than $1,000 in that transaction (R. 317-318, 337; Govt. Ex. 25).

ARGUMENT

1. There is no merit to petitioners' contention (Pet. 8-13) that the evidence was insufficient to support the verdict under the standards set down in *Holland* v. *United States*, 348 U.S. 121. The opening net worth was calculated as of December 31, 1953, and the total value of petitioners' assets for each succeeding year

was computed on the basis of evidence from third parties and admissions by petitioners. The district court and the court of appeals were satisfied that the opening net worth for 1957 was, by this method, "establishe[d] with reasonable certainty" (Pet. iv), and the improvements made on petitioners' motel during that year established a significant increase in net worth.[2] As in *Holland*—where the likely source of the added revenue was a going hotel business—it was quite clear on this record that the source of petitioners' income was their taxable motel operation. And the element of willfulness was more than adequately proved by Mrs. Hamman's false statement to petitioners' accountant that any excess of expenditures over income for 1957 was attributable to petitioners' use of their savings (Govt. Exs. 6, 7, 35, p. 3). The inference of guilt was further supported by the false explanations given by petitioners to the investigating agents.

2. Nor is there any merit to the claim that it was error to allow the presentation of evidence of understatements of income in pre-indictment years (Pet. 4-8). Such evidence was limited to the issue of intent, and it was clearly permissible for that purpose. It showed that the failure correctly to report petitioners' profits in 1956 and 1957 was not the result of oversight or neglect but was part of a pattern of conduct

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[2] The breakdown of the government's computation was precise enough to render a difference of about $7,000 in total assets adequate for conviction (Pet. iii). There is no substance to petitioners' claim that this is an insufficient "approximation" (Pet. 8-9).

which began shortly after petitioners purchased their motel property. See *Ballantyne* v. *United States*, 293 F. 2d 112, 114 (C.A. 5th), certiorari denied, 369 U.S. 802; *United States* v. *Frank*, 245 F. 2d 284, 287-288 (C.A. 3d), certiorari denied, 355 U.S. 819; *Mitchell* v. *United States*, 213 F. 2d 951, 958 (C.A. 9th), certiorari denied, 348 U.S. 912; *United States* v. *Sullivan*, 98 F. 2d 79, 80 (C.A. 2d); *Malone* v. *United States*, 94 F. 2d 281, 286-287 (C.A. 7th), certiorari denied, 304 U.S. 562; *Emmich* v. *United States*, 298 Fed. 5, 9 (C.A. 6th), certiorari denied, 266 U.S. 608; 2 Wigmore, *Evidence*, § 302-304, 316, 341 (3d Ed., 1940).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

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